SUMMARY OF TESTIMONY OF EDMUND G. BROWN JR.
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
AT A FIELD BRIEFING OF THE
UNITED STATES SENATE COMMITTEE
ON ENVIRONMENT AND PUBLIC WORKS

THURSDAY, JANUARY 10, 2008
CITY COUNCIL CHAMBER, LOS ANGELES CITY HALL
200 NORTH SPRING ST.

Thank you, Madam Chair and members of the Committee for this opportunity to talk with you about the United States Environmental Protection Agency's denial of California's request for a waiver to regulate greenhouse gas pollution from motor vehicles.

California agrees with you, Senator Boxer, that it is crucial that EPA's waiver decision be reversed. I understand that Administrator Johnson has declined to appear before the Committee today. That is unfortunate because he is the one who must be held accountable for EPA's egregious conduct.

I will testify about the importance of the waiver to California, the impact of EPA's denial, and what California is doing in response to EPA's denial of its right to protect the health and welfare of its citizens. As you know, California is aggressively challenging EPA's decision, along with 15 other states and several environmental groups. The people of the State of California, and indeed of this Nation, deserve no less.

I. EPA DELAYED ITS WAIVER DECISION AND THEN SUBVERTED THE ADMINISTRATIVE PROCESS.

EPA's conduct in the waiver process has been egregious. California's waiver request was submitted to EPA under the longstanding authority it has had since 1967 as the only state allowed by the federal Clean Air Act to set its own vehicle emission standards. Since 1970,

California has asked EPA for many waivers and has never been denied. All California needs from the U.S. EPA is a normally-routine waiver that has been granted more than 50 times over the past four decades, and has never before been denied.

In 2005, when we asked EPA for this waiver, it stalled. It claimed it had no legal authority to grant the waiver. It said it had to wait for the Supreme Court to decide *Massachusetts v. EPA*. That decision came out on April 2, 2007. Still, EPA refused to act on California's waiver.

Meanwhile, the automobile industry attacked California's regulation in multiple courts. Those attacks have failed. Two federal courts have soundly and thoroughly denied all of industry's claims. First, in Vermont, then in California. California has the right to set its own pollution standards. The automakers made their case against California's leadership role, and they lost. Still, EPA did nothing to address our waiver request.

Finally, this Congress called Administrator Johnson before it to explain why EPA had not acted. Under that pressure, he relented and made a commitment to act by the end of 2007. He finally did act, as you know, but the action he took was sham. In a two-page letter, he announced EPA's denial of California's waiver request. The letter is shocking in its utter lack of coherence or legal justification for the waiver denial. EPA staff and attorneys themselves have called the decision "legally and technically unjustified and indefensible." There's no analysis to support the decision. There's no transparency.

Federal administrative agencies are not supposed to conduct business like that. We -- not just California, but all of the American people -- are entitled to better from our public institutions. Instead, we have learned that Administrator Johnson made the decision to deny

California's waiver before having his staff write the legal justification for it. He also made this decision against the advice of the scientific experts whose job it is to protect the public's health and welfare and to evaluate California's waiver request on the merits, EPA technical staff.

We asked EPA -- when will the agency's analysis be ready for public review? EPA said "we don't have a date for completing the process." How can the Agency have made a decision if the analysis has not been done? EPA has no answer for this.

As you may know, a few months ago, California filed a lawsuit against EPA charging that the agency had unreasonably delayed making a decision on our waiver request. Now EPA's gamesmanship has gone from "unreasonable delay" to "unconscionable delay." Administrator Johnson has made a decision in search of a rationale. By stalling, EPA is frustrating judicial review of its unjustified actions.

EPA's decision to deny California's waiver reflects back-room deal-making and not its considered scientific judgment. It abrogates the right of California and other states to protect the environment and the health and welfare of our citizens. EPA's action prevents not only California, but also the 17 states that have adopted, or intend to adopt, California's GHG regulation, from protecting their public and their environmental resources.

The decision benefits the automobile industry, its lawyers and lobbyists at the expense of the people the government is supposed to serve. EPA has taken a matter of grave public importance and subverted it to benefit special interests. We in California, and other states across the Nation are challenging EPA's action. We hope every American will stand behind us in that effort. We support you in your investigation.

II. EPA's DENIAL OF CALIFORNIA'S WAIVER IS WRONG ON THE MERITS

EPA's denial of the waiver is wrong on the merits. Every reason stated in Administrator Johnson's letter, is wrong.

First, it is completely absurd for EPA to claim that California has not demonstrated compelling and extraordinary conditions. For decades, EPA has agreed that a waiver determination is based on whether California needs its own emissions program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions. As recently as December 2006, EPA found that California faces compelling and extraordinary conditions and needs its own standards to meet them. (71 Federal Register 78192, December 28, 2006.)

And long before that, back in a 1975 waiver determination, EPA said that the waiver provisions in the Clean Air Act must be read:

> in the light of their unusually detailed and explicit legislative history. . . . . Congress meant to ensure by the language it adopted that the Federal government would not second-guess the wisdom of state policy here. . . . Sponsors of the language eventually adopted referred repeatedly to their intent to make sure that no "Federal bureaucrat" would be able to tell the people of California what auto emission standards were good for them, as long as they were stricter than Federal standards.

40 Federal Register 23103, May 28, 1975. In fact, up until now EPA has consistently recognized that compelling and extraordinary conditions in California justify our emissions program. To us in California, this fact is obvious.

California has 32 million registered vehicles, twice as many as any other state, and cars generate 20 percent of all human-caused carbon dioxide emissions in the United States and at least 30 percent of such emissions in California. That alone presents compelling and extraordinary conditions justifying that the waiver be granted.

While California is the only state required to seek a waiver from EPA, Congress allows other states to opt into California's program automatically. They do not need EPA's approval and they do not need to demonstrate compelling and extraordinary conditions.

In 1977, when Congress decided to allow other states to adopt California standards, it did so to give them a greater role in their own administration of the Clean Air Act. Congress expressed concern at the time that the Clean Air Act's preemption provisions were unduly restricting the capability of non-California states to obtain emissions reductions from new motor vehicles, which contributed to their inability to meet the NAAQS. As the House committee stated in 1977:

> The Committee is concerned that this preemption (section 209(a) of the Act) now interferes with legitimate policy powers of States, prevents effective protection of public health, limits economic growth and employment opportunities in non-attainment areas for automotive pollutants, and unduly stifles enforcement of present federal emission standards.

(H.R. Rep. No. 294, 309 [1977]). Thus, Congress enabled those states to regulate motor vehicles more stringently than the federal government without making any showing to EPA. It simply required California to be the pioneer.

California's situation is indeed compelling and extraordinary -- our typography, the number of motor vehicles in our state, and our natural resources -- demonstrate that. Congress' decision to allow other states to adopt California's standards has fostered innovation and enabled more stringent regulation of automobiles. It allows states to retain their prerogatives as sovereign governments to serve as laboratories of innovation and democracy. EPA's decision to deny California's waiver puts all of this into jeopardy. EPA's action thwarts California and its sister states' desire to lead the nation in responding to the threat of global warming.

Global warming -- the problem our regulation is designed to address -- is the most urgent environmental issue of our time. Its impacts are real, dramatic, and they are happening now. In California, those impacts are compelling and extraordinary. They are described by the California Air Resources Board (ARB) in its testimony on May 22 and 30 to EPA as part of our waiver request. Among the impacts are the fact that hotter temperatures expected to result from climate change will cause more ozone in California. California's unique topography, and its high human and vehicular population, have already caused higher ozone concentrations than other parts of the country. Climate change will make the problem even more extreme. Climate change will cause increases in wildfires. More wildfires means more wildlife and habitat destruction, more destruction of peoples' homes and possessions, and increases in other pollutants such as particulates resulting from these wildfires. Climate change will have water impacts for California that will be felt acutely. The warming of our western mountains will cause decreased snowpack, more winter flooding, reduced summer water flows, to name a few.

The extent and severity of global warming is precisely the reason that we must act now. It should not be used, as EPA does, as an excuse to prevent California from taking action. This

is not only legally wrong, it's irresponsible. The United States Supreme Court recently admonished EPA on this very point – which EPA has obviously chosen to ignore. Here's what the Supreme Court said its opinion in response to EPA's argument that it had chosen to take no action to combat global warming because the problem is too big to be solved by one regulation:

> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.

Yet, EPA is using that same, already rejected rationale, to doom California's GHG regulation.

Echoing the automobile industry's Washington, D.C. lobbyists, Administrator Johnson's letter claims that allowing California's regulation would lead to a "confusing patchwork of state rules." In fact, there is no "patchwork." Congress long ago gave other states only two choices: to stick with federal standards or adopt California's standards "identically."

Congress, when it passed the new energy legislation that raises fuel economy standards to "at least 35 miles per gallon" by 2020, rejected auto industry and Bush administration demands for language that would have blocked California's standards. Indeed, the new law protects the California's power under the Clean Air Act to regulate vehicles' global warming emissions. Yet, EPA cites the new law as one of the reasons for its denial of California's waiver. This undermines Congress' intent in its new legislation.

The CAFE requirements set out in the new energy legislation and the California's GHG requirements are not identical. California's standards address greenhouse gas emissions and are

designed to protect the environment and the public health and welfare. Similarly, EPA's statutory mandate is the same – protection of the environment and the public health and welfare. The Energy Bill and its CAFE standards are designed to reduce energy consumption, not protect the environment. In fact, in November the federal appeals court in San Francisco -- the same court we are now asking to reverse EPA's denial of California's waiver -- overturned the Bush administration's tiny increase in CAFE standards for SUVs and other light-trucks because the administration had put zero value on the benefits of greenhouse gas reductions.

III. CALIFORNIA'S GHG REGULATION IS MORE EFFECTIVE THAN THE NEW FEDERAL CAFE LAW.

Administrator Johnson's letter also claims that the new CAFE law (HR6 the 2007 Energy bill) is a more effective approach to reducing GHGs than California's GHG regulation. This is demonstrably untrue. Administrator Johnson claims that the new federal law mandates improved national fuel economy standards which will require a fleetwide average of 35 miles per gallon. His letter also claims that California's GHG regulation would have set a standard of only 33.8 miles per gallon. Our staff at ARB immediately reviewed the Administrator's letter. They had never seen this 33.8 mpg number before. Neither the Administrator nor EPA provided any basis for the number. So CARB analyzed it. They found that the number is incorrect. Their analysis shows that the California's regulation would reduce emissions from new vehicles by nearly 30 percent by 2016. That is <u>double</u> the estimated reductions that would result from the new energy law.

I am providing the Committee with a copy of that study so you can consider it as well.

IV. CALIFORNIA SUPPORTS A VIGOROUS AND FULL INVESTIGATE EPA.

The Administrator's decision does not pass muster under the law. We are confident -- as EPA staff reportedly are -- that it will be reversed in court. In *Massachusetts v. EPA*, the Supreme Court rebuked EPA for exceeding its discretion and rely only on a White House "laundry list" of reasons for declining to regulate carbon dioxide. EPA, and its administrator must abide by the law under the Clean Air Act.

Another question, however, is whether the head of EPA, Administrator Johnson, has betrayed the public trust and abused his office. This question, too, must be answered. We urge you to leave no stone unturned in your investigation. As the head of an independent federal agency, Administrator Johnson is subject to the rule of law and congressional oversight. Mr. Johnson must be called to give an account of their actions.

Aside from requiring Mr. Johnson and EPA to provide sworn testimony and to produce all relevant documents, I urge you to question him about his contacts with the White House staff and his meetings with automobile industry executives and the White House. We have probably all seen the press accounts describing the auto executives direct appeal to Vice President Cheney. EPA staffers told the LA Times that Johnson "made his decision" only after Cheney met with the executives. On multiple occasions in October and November, Cheney and White House staff members are said to have met with industry executives, including the CEOs of Ford Motor Co. and Chrysler. We have a right to know what happened at those meetings, who was there, and what was said. Was Administrator Johnson acting on the Administration's directives when he denied California's waiver request?

V. CONCLUSION

California met every criteria for the waiver on the merits. EPA should have granted the waiver a long time ago. EPA's denial of the waiver is a parting gift by this Administration to the automobile industry. Even when EPA's decision is reversed, it will have achieved the industry's goal of delay. Delay means more money in the pockets of automobile industry executives at the expense of the public health and welfare. Make no mistake -- EPA's decision will have long-term environmental consequences. It prevents not only California, but also the 17 other states ready to implement California's rule, from moving forward. Every day the denial is allowed to stand it harms the citizens of California and the rest of the nation – indeed the planet, by denying us the ability to do everything we can to address the dire problem of global warming. I urge you to do everything you can to make EPA's decision as short-lived as possible and to fully investigate EPA's decision-making process in the waiver. We in California are doing everything we can, too.